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06 UNITED STATES DISTRICT COURT
07 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

08 KHAMIS AKIM KOMBO,) CASE NO. C08-1799-RSL
09)
Petitioner,)
10)
v.) REPORT AND RECOMMENDATION
11)
A. NEIL CLARK,)
12)
Respondent.)
_____)

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14 I. INTRODUCTION AND SUMMARY CONCLUSION

15 Petitioner Khamis Akim Kombo, proceeding pro se, has filed a Petition for Writ of
16 Habeas Corpus pursuant to 28 U.S.C. § 2241, which challenges his detention by the U.S.
17 Immigration and Customs Enforcement (“ICE”) at the Northwest Detention Center in Tacoma,
18 Washington. (Dkt. 8). He requests that this Court order his release from custody on conditions
19 or reasonable bond, arguing that “such custody violates the due process rights of the Petitioner.”
20 *Id.* at 1. Respondent has filed a motion to dismiss, arguing that petitioner was permitted to
21 land in the United States as a D-1 crewman aboard the M/V Maria-M for a temporary period,
22 and as such, he is not entitled to removal proceedings. (Dkt. 13). Respondent contends that

01 the Department of Homeland Security (“DHS”) retains sole authority for the parole of alien
02 crewman and that petitioner has not exhausted his administrative remedies by making a request
03 for parole with DHS. *Id.*

04 Having carefully reviewed the entire record, I recommend that petitioner’s habeas
05 petition (Dkt. 8) be DENIED and respondent’s motion to dismiss (Dkt. 13) be GRANTED.

06 II. BACKGROUND AND PROCEDURAL HISTORY

07 Petitioner is a native and citizen of Tanzania. (Dkt. 14 at R56-57). On August 2, 1999,
08 he was admitted to the United States at New Orleans, Louisiana as a D-1 crewman aboard the
09 M/V Maria-M with authorization to remain in the country until his ship left port for a period not
10 to exceed twenty-nine days. (Dkt. 14 at R52). Petitioner did not depart the United States as
11 required.

12 On February 13, 2004, petitioner married United States citizen Shirley Dean Butts.
13 (Dkt. 14 at L9). On May 30, 2005, Ms. Butts filed a form I-130 Petition for Alien Relative on
14 petitioner’s behalf, and petitioner filed a form I-485 Application to Register Permanent
15 Resident or Adjust Status. (Dkt. 14 at L207-08, L56-59). On January 10, 2006, the
16 Department of Homeland Security (“DHS”) approved the I-130 visa petition and forwarded it
17 to the National Visa Center pending a decision on the I-485 application. (Dkt. 14 at L209).
18 While petitioner’s I-485 application was pending, DHS conducted a marriage fraud
19 investigation and discovered that petitioner’s marriage to Ms. Butts was a sham and that the
20 only purpose of the marriage was to obtain lawful permanent residence status for petitioner.
21 (Dkt. 14 at R30). On September 3, 2008, Ms. Butts withdrew her I-130 petition, admitting that
22 she was “paid \$5,000 to marry Khamis Kombo to help him get a green card.” (Dkt. 14 at

01 L213). Ms. Butts I-130 petition was subsequently revoked, and petitioner's I-485 application
02 was denied. (Dkt. 14 at R42-44, L212).

03 On October 30, 2008, ICE arrested petitioner and served him with a Warrant of Arrest,
04 Notice of Custody Determination, and Notice to Appear, charging him with removability under
05 8 U.S.C. § 1182(a)(6)(A)(i), as an alien present in the United States without being admitted or
06 paroled. (Dkt. 14 at L68-71). Bond was initially set at \$30,000, however, on November 6,
07 2008, ICE determined that petitioner had been admitted to the United States as a D-1 crewman
08 and that the charge of removability under § 1182(a)(6)(A)(i) and the removal proceedings were
09 improper. (Dkt. 14 at R86). ICE cancelled the Notice to Appear as improvidently issued and
10 petitioner's case was referred to an Immigration Judge ("IJ") for removal without a hearing
11 pursuant to 8 C.F.R. § 252.2(b). (Dkt. 14 at L84). On October 31, 2008, petitioner filed an
12 I-589 application for asylum, asserting a fear of return to Tanzania. (Dkt. 14 at R49-71).

13 On November 5, 2008, petitioner appeared, with counsel, for a bond hearing before an
14 IJ. (Dkt. 14 at L79). The IJ denied petitioner's bond request, finding that because petitioner
15 was not in removal proceedings he was barred from receiving bond pursuant to 8 C.F.R.
16 § 252.2(b). *Id.* Petitioner reserved appeal but never filed an appeal of the IJ's custody order
17 with the Board of Immigration Appeals ("BIA"). *Id.*

18 On December 15, 2008, petitioner filed the present action challenging his detention.
19 (Dkt. 8). Respondent filed a return memorandum and motion to dismiss on February 9, 2009.
20 (Dkt. 13). Petitioner did not file a response.

21 On or about March 12, 2009, petitioner appeared for an individual merits hearing before
22 an IJ, who denied petitioner's application for asylum. (Dkt. 13 at 4). Petitioner's appeal of the

01 II's decision denying his application for asylum is due on April 20, 2009.

02 III. DISCUSSION

03 "A crewman who was granted landing privileges on or after April 1, 1997, and who has
04 not departed . . . on the vessel of arrival, or on another vessel or aircraft . . . shall be removed
05 from the United States without a hearing, except as provided in § 208.2(b)(1)." 8 C.F.R.
06 § 252.2(b). A crewman may be referred to an immigration judge for a limited hearing solely
07 on asylum or withholding, however, the hearing may not be used to challenge removability or
08 any other forms of relief. *See id.* Section 208.2 provides an immigration judge exclusive
09 jurisdiction over any asylum application filed by an alien crewman. *See* 8 C.F.R. § 208.2.
10 Although a crewman may be referred to an immigration judge for a limited hearing based only
11 on asylum, the immigration judge has no jurisdiction to review any other matters, such as
12 removal or bond. *See* 8 C.F.R. § 208.2(c)(1)(providing immigration judges exclusive
13 jurisdiction over any asylum applications filed by alien crewmen); 8 C.F.R. § 252.2(b).

14 The summary procedure established by Congress under INA § 252(b) "was designed to
15 address the serious problems created 'by alien crewmen who deserted their ships and secreted
16 themselves in the United States'" recognizing that "'the temporary 'shore leave' admission of
17 alien seamen who remain illegally constitutes one of the most important loopholes in our whole
18 system of restrictions and control of the entry of aliens into the United States.'" *Matter of Di*
19 *Santillo*, 18 I&N Dec. 407, 410 (1983) (quoting *Immigration and Naturalization Service v.*
20 *Stanisic*, 395 U.S. 62, 73-74 (1969)).

21 The record establishes that petitioner was admitted to the United States on August 2,
22 1999, as a D-1 crewman with authorization to remain in the country until his vessel left port for

01 a period not to exceed twenty-nine days. (Dkt. 14 at L82-84). Petitioner failed to depart aboard
02 his vessel as required. *See* INA § 252(a), 8 U.S.C. § 1282(a); 8 C.F.R. 252.1(d). As a
03 crewman, petitioner may pursue asylum, which he has done, but is not entitled to removal
04 proceedings before an immigration court. *See Id.* Likewise, the immigration court has no
05 jurisdiction to consider a challenge to petitioner’s removal from the United States or his
06 detention. *Id.* Rather, DHS retains exclusive jurisdiction over decisions of whether to parole
07 a crewman into the United States. *See* 8 C.F.R. § 208.5(b); 8 C.F.R. § 253.1(f); 8 U.S.C.
08 § 1182.

09 Parole decisions are made on a “case-by-case basis for ‘urgent humanitarian reasons’ or
10 ‘significant public benefit,’ provided the aliens present neither a security risk nor a risk of
11 absconding.” 8 C.F.R. § 212.5(b). Decisions to deny parole are not reviewed under the
12 “traditional abuse of discretion standard.” *See Mason v. Brooks*, 862 F.2d 190, 193 (9th Cir.
13 1988)(citing *Garcia-Mir v. Smith*, 766 F.2d 1478, 1485 (11th Cir. 1985)). “Instead, a rejection
14 of parole will be upheld if the agency advanced a facially legitimate and bona fide reason for the
15 denial.” *Id.* at 193-94.

16 Here, however, petitioner has never requested parole. Although petitioner requested a
17 bond redetermination, the IJ determined that he lacked jurisdiction pursuant to 8 C.F.R.
18 § 252.2(b) because petitioner was not in removal proceedings. (Dkt. 14 at L79). Petitioner
19 did not appeal this finding, and has never sought parole from DHS, although he remains eligible
20 to do so. Nevertheless, petitioner argues that his custody violates procedural due process
21 requirements and requests that this Court order respondent to release him on bond or
22 conditions.

The Court finds that petitioner does not have standing to challenge the conduct of respondent because he failed to avail himself of the administrative remedies available to him. In order to have standing to bring a due process claim, petitioner must have suffered actual injury as a result of the procedure about which he complains. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136 (1992); *see also Lewis v. Casey*, 518 U.S. 343, 351, 116 S. Ct. 2174, 2180 (1996)(holding that prisoners did not have standing to bring claims that the insufficiency of the prison library violated their constitutional rights unless they showed that this actually hindered their efforts to pursue legal claims). Here, petitioner wholly refused to avail himself of the administrative procedures available to him by failing to request parole for alien crewman from DHS. The government cannot be held to have violated procedural due process requirements when it has made administrative procedures available and the petitioner has simply refused to avail himself of them. Because petitioner has not taken advantage of the procedural processes available to him, he lacks standing to challenge such procedures as constitutionally inadequate. *See Lujan*, 504 U.S. at 560-61.

IV. CONCLUSION

For the foregoing reasons, I recommend that respondent's motion to dismiss be granted, and that the action be dismissed. A proposed Order accompanies this Report and Recommendation.

DATED this 1st day of April, 2009.

s/ Mary Alice Theiler
United States Magistrate Judge